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# MEDICAL EXPERT TESTIMONY.[1]

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THIS article is offered, in the main, as a defence of the medical expert and of medical expert testimony as it is presented in our courts to-day. It is also offered as a protest against the scathing criticisms that this kind of testimony has so often received of late at the hands of many lawyers, and, I regret to say, of many members of the medical profession as well. In fact, I am not sure but that these criticisms have come fully as much from physicians as from lawyers. For the last few years the various medical publications have been teeming with articles sharply criticising the character of medical expert testimony, and, at the same time, suggesting various modes of improvement in the securing of this class of evidence. The general trend of this criticism, both by lawyers and doctors, has been to characterize this class of evidence as confusing, misleading, valueless, mercenary and false, and an unbiased reader knowing nothing of the facts in question would be irresistibly led to the conclusion that a large proportion of medical gentlemen, when they were placed upon the stand as experts, become unscrupulous partisans and oftentimes untruthful contestants in the case. And I especially protest against this misrepresentation coming from members of the medical profession, nearly all of whom, at one time or another, have occasion to be employed as expert witnesses in our courts.

When we recall the high standard of honor by which the conduct of the great mass of our profession is regulated in every other relation of life, through all the cities and villages of New England, and recall, too, the universal confidence and respect reposed in them by the communities in which they live, and that in all matters of business, education and health that engage the attention of public-spirited citizens we find the members of our profession always in the lead, and always active in every movement that makes for the well-being of our citizens at large, it would indeed be very strange if in one single relation this great body of men, so honorable and so honored, should become mercenary and untruthful as medical experts in our courts. The whole fact is that when we sift this vituperation down, and get really at the bottom of the ground for it all, we simply find that it rests upon this one fact, that medical experts very frequently, in the trial of a particular cause, give very different and oftentimes conflicting opinions. Now, we will all agree that in the trial of very many causes, and in fact all those causes that have to do with the physical and mental condition of the litigants,

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medical expert testimony is a necessity. If we could thoroughly scan that broad realm of medical jurisprudence in which medical expert testimony necessarily plays an important part we would find that many seeming contradictions of the different expert witnesses would be reconciled, and we would see, too, that the irreconcilable conclusions arrived at were in no way inconsistent with the perfect integrity and honestness of purpose of the men who have testified; but the necessarily narrow limits of this article will allow us to cover only a few examples here and there, yet I am sure these will be enough to show that the medical expert is usually unjustly assailed. I do not mean to say that there are no physicians who as medical experts are mercenary and untruthful, but I do maintain that their number is exceedingly small, and that the appearance of such men in our courts, bringing disgrace to medical expert testimony, is of infrequent occurrence.

For the past twenty-two years the Commonwealth has relied, in the main, for its expert testimony in its prosecution of criminals charged with manslaughter and murder upon seventy-two expert witnesses, most of whom are members of this Society, and in the great number of prosecutions during this long time I do not know of a single instance in which one of these experts of the Government, in his statement of facts, or in the giving of his opinion as an expert, has ever been accused, or suspected, of swerving from the exact truth for the aid of the prosecution, or for the harm or benefit of the accused.

Turning now to the civil courts, we come to that broader field of judicial inquiry which requires the aid of the medical expert. Here we encounter in great numbers and endless variety those suits for redress for every kind of personal injury, and in the trial of these cases the medical expert is an indispensable adjunct. Taking as an example one of those suits for personal injury in which the plaintiff is asking for compensation, let us look for one moment at the kind of testimony that is sought from the expert witnesses of both plaintiff and defendant. We find, as a general rule, that the medical experts are giving their testimony in two very distinct directions; that is, we find them testifying both as to matters of fact and questions of opinion. The medical gentlemen called will usually consist of the doctor who has attended the patient, and the several medical experts on each side, who have also, on one or more occasions before the commencement of the trial, examined the plaintiff. Therefore, all of them are in a position to testify, to a greater or less extent, as to matters of fact.

First, the attending physician presents the facts in the case, giving, for instance, the history of the patient's condition from the time of receipt of the accident, the treatment he received, and his condition as he has gone along, up to the time of the trial; that is, he is asked to give all these facts, and then, as an expert, too, to give his opinion as to the seriousness of the accident, the effect that it has had upon his sufferings up to that time, and also his opinion as to the future damages the patient may sustain. The medical experts on both sides are also asked to testify as to the existing conditions

they found upon examination; and there is one thing particularly noteworthy, namely, that in all these questions of fact as to the condition of the patient we find the expert witnesses practically agreeing. When one leg measures in length two inches more than the other, or is that less in diameter, when one knee is swollen to twice the size of the other, a joint anchylosed, muscles atrophied, limbs distorted and tendon reflexes impaired, we never see, on the part of these experts, a disagreement as to the existence and extent of these injuries; that is, it is especially important to note the substantial agreement that we always find in all these things. In short, the palpable, perceptible facts of the case are always stated with the utmost fairness. There is never any disagreement in the testimony of the experts between one side and the other. The attending physician, in spite of all the sympathy and interest that he has in his patient, as you will note, is very faithful in his testimony as to these patent facts in the case.

But the moment the scope of inquiry changes from the lesions which the patient presents, and which are patent to our eyes and our touch, and passes on to matters of opinion, then wide differences become apparent. Not only will the opinions oftentimes be very different but absolutely conflicting. It is simply that the witnesses have passed from a field of exact knowledge into one more or less involved in conjecture and theory. For instance, the plaintiff may come before the experts presenting no physical signs of injury whatever. There has been no injury of a limb; no scar of any wound on the body; no evidence of any injury of the spinal column; no paresis of any muscles; no fault of tendon reflexes; in short, no lesion upon which we can place our fingers. Still, the patient has received a fall, or a concussion; shows anemia, a lowered vitality, complains of severe headaches, loss of memory, fault of vision, pains in the back, weakness of muscles, loss of sleep, and numerous other symptoms (frequently inconsistent with each other) that the neurasthenic often presents. To the one physician, this imaginary patient of mine presents a typical case of concussion of the spinal cord. He is perfectly certain that such an accident is possible and that it has happened in this case, and he may even go so far as to believe and explain that at the time of the accident there occurred a disturbance of the ultimate molecules of the spinal cord, and that the present condition of the patient is absolutely typical of such an accident, and that her future recovery is a matter of very great doubt. Believing this, he will probably go on and explain to the jury that this aforesaid disturbance of the ultimate molecules has actually occurred, and if he believes this theory at all he will be very certain of the correctness of it, although, of course, there is not one iota of evidence that such a thing did occur, or ever can. While to another expert, this same patient, without the slightest evidence, from the crown of her head to the soles of her feet, of having ever received any injury, so far as her physical examination goes, presents simply the type of the hysterical woman, and, in view of the circumstances surrounding the case, in his mind is probably a malingerer.

Between these extreme and irreconcilable opinions as to the character of the case will be presented perhaps as many others as there are different men to express them, the latter less radical, but as inconsistent with each other as the two that I have indicated. As we candidly and impartially consider this case, no one of us would doubt for a moment that this conflicting and irreconcilable testimony was given by the various medical experts perfectly honestly and conscientiously. In fact, these differences of opinion, so far as they show anything, tend to establish the absolute good faith and integrity of the witnesses, and really, who in the world can say, in the midst of these differences, where the truth lies? Is there any diagnostician among us of such wisdom and such experience that he can aid the jury in elucidating the exact truth? While it is very desirable to the cause of justice that this snarled skein of fact and theory should be unravelled and the truth separated from the error, yet there is no source from which this assistance can come. The fact is that justice is asking an exact opinion from a very inexact science, and the medical experts have given all of knowledge they have and all of theory that they have constructed to elucidate the complex conditions that surround the case. They have simply given the best they had, and that is very far from any precise conclusions.

In support of my contention, a very eminent lawyer and judge of New Hampshire, with many years of experience in court and on the bench, expresses himself in the following terms:

"This bias, or inclination, in favor of the party by whom the witness is employed is probably the most frequent complaint of all against the expert witness, and the inclination, or partiality, is often characterized by terms indicating dishonesty and corruption. But it is my belief, resulting from the observation and experience of many years, that there are few instances in which the scientific witness permits himself to testify, or to be engaged on a side contrary to his convictions derived from a careful examination of the case."

I suppose another cause for these irreconcilable differences of opinion may be found in the mental characteristics of physicians, themselves, as a class. For the most part, they are men of strong convictions. They are much in the habit, in the absence of exact knowledge, of framing theories and tracing back causes from effects, or following out effects from causes. An endless field of speculation is presented to them in the study of the influence of the mental and moral conditions upon physical disturbances, but most of all in the study of the functional deviations of the nervous system from the standard of health. This opens a very wide field for speculation and theory, which is very little guided by actual and precise knowledge. Physicians are, therefore, very prone to form all sorts of theories, and, when once formed, they adhere to them with a pertinacity that would even do credit to members of the clerical profession. Hence, when we descend to the practical arena of the court room, these pet theories of ours are sure to come out and stand forth in clashing inconsistency with each other, and the strict honesty of the experts simply emphasizes the

contradictions that appear. It is just this condition of things that is complained of in the matter of medical expert testimony.

Now, is it certain that the cause of justice would be promoted if we could all agree in our theories instead of having different ones? Is it at all certain that an agreed theory would bring the jury any nearer to a just appreciation of the case than they have now reached in sifting the conflicting testimony as it has been presented? It is true that this condition of things is unsatisfactory to court, lawyers and physicians themselves, but is there any remedy for it? It seems to me that the character of the testimony asked for and the characteristics of the men giving it make these differences inherent and irremediable. A supposed remedy, however, has been suggested, and that is that in the trial of these causes the judge should appoint some disinterested and capable expert to testify in the case, while allowing the litigants to call their respective expert witnesses, as is now done. This course of procedure seems to me to be open to some very grave objections. In the first place, we have no reason to suppose that the physician, or surgeon, so selected, would be markedly more competent than other experts who would be employed, while the known fact that he was thus selected to instruct the jury would give his theories in the case almost the weight of judicial authority. Yet, as a matter of fact, he would be quite as likely to be wrong in his theories and conjectures as the other experts employed. So, while he *might* further the cause of justice, there would still be a very great danger, on account of the weight of authority that would thus be given his opinions, that he might work far greater injustice to either defendant or plaintiff than would be the case with the present procedure. That is, simply his official position in the court would give to his opinions a weight and importance that could in no way justly attach to them. Were it possible to select a single man so markedly above his *confrères* in experience and ability that his testimony in a given case would be entitled to the greater authority the court would give him this selection might be a remedy for the difficulties we are considering. If the man selected were not superior in ability and judgment to his *confrères* in the case his testimony would acquire a fictitious and unjust importance. Therefore, I believe that the selection of such an expert in such a manner would be a hindrance to the cause of justice rather than a remedy to the conditions complained of. For the best selection possible of such an expert to be made, it would have to be made by our profession. When made by the judge it is a selection of a layman, so far as the medical profession is concerned, and it would be just as absurd, in case some lawyer were to be appointed to the bench, to leave the selection of that lawyer to medical men as it would be to have a member of the legal profession, even if he were a judge, select the most competent expert from among physicians. Now, personally, if I were going into court asking justice for some injury received, I would go about among my professional brethren and select those experts who entertained the same opinion as to the extent of my injuries, the amount of damage I had received and was going to suffer, as I believed myself, and I would call these men as medical experts. On the other hand, I

should expect the defendant corporation to select those experts who entertained the view of my condition that accorded with theirs, who, in short, believed exactly as they did, and we would present our case before the jury. I certainly should seriously object to an expert employed by the court testifying in this case of mine, simply because I should feel that his testimony would acquire a weight and importance to which the ability of the man would not entitle it, and I believe that the jury, listening to the testimony of my experts on the one side and that of the defendant corporation on the other, would be more likely to reach a just conclusion in the case without, rather than with, the assistance of the court expert.

In conclusion, I will say that in this matter of the employment of expert testimony I do not believe there is so very much to correct. I hold that the great mass of medical experts, which includes our entire profession, are conscientious and honest, with very rare exceptions, in the evidence they give, and that, so far as the testimony of experts in regard to fact is concerned, they always agree, and in so far as their testimony is an expression of opinions, they will often very widely disagree, and there is no remedy for that. And whatever improvement the future may have in store for this kind of evidence must simply come through the medical profession itself. The greater advances we make in science, the greater our ability, the better we understand the laws that govern the mental, moral and physical natures of our being, the less erratic and the more uniform and reconcilable our theories will become. And outside of this advancement there is no remedy for the faults of medical expert testimony, if to any great extent such difficulties now exist.